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SENATE BILL 476

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

Ben D. Altamirano

AN ACT

**RELATING TO UNEMPLOYMENT COMPENSATION; AMENDING THE
UNEMPLOYMENT COMPENSATION LAW TO PROVIDE ADDITIONAL CRITERIA
FOR THE TRANSFER OF EXPERIENCE HISTORY WITH THE TRANSFER OF AN
EMPLOYING ENTERPRISE; PROVIDING CIVIL AND CRIMINAL PENALTIES.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**Section 1. Section 51-1-11 NMSA 1978 (being Laws 2003,
Chapter 47, Section 11) is amended to read:**

"51-1-11. FUTURE RATES BASED ON BENEFIT EXPERIENCE. --

**A. The division shall maintain a separate account
for each contributing employer and shall credit the
contributing employer's account with all contributions paid by
that employer under the Unemployment Compensation Law. Nothing
in the Unemployment Compensation Law shall be construed to
grant an employer or individuals in the employer's service**

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1 prior claims or rights to the amounts paid by the employer into
2 the fund.

3 B. Benefits paid to an individual shall be charged
4 against the accounts of the individual's base-period employers
5 on a pro rata basis according to the proportion of the
6 individual's total base-period wages received from each
7 employer, except that no benefits paid to a claimant as
8 extended benefits under the provisions of Section 51-1-48 NMSA
9 1978 shall be charged to the account of any base-period
10 employer who is not on a reimbursable basis and who is not a
11 governmental entity and, except as the secretary shall by rule
12 prescribe otherwise, in the case of benefits paid to an
13 individual who:

14 (1) left the employ of a base-period employer
15 who is not on a reimbursable basis voluntarily without good
16 cause in connection with the individual's employment;

17 (2) was discharged from the employment of a
18 base-period employer who is not on a reimbursable basis for
19 misconduct connected with the individual's employment;

20 (3) is employed part time by a base-period
21 employer who is not on a reimbursable basis and who continues
22 to furnish the individual the same part-time work while the
23 individual is separated from full-time work for a
24 nondisqualifying reason; or

25 (4) received benefits based upon wages earned

. 153645. 2

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1 from a base-period employer who is not on a reimbursable basis
2 while attending approved training under the provisions of
3 Subsection E of Section 51-1-5 NMSA 1978.

4 C. The division shall not charge a contributing or
5 reimbursing base-period employer's account with any portion of
6 benefit amounts that the division can bill to or recover from
7 the federal government as either regular or extended benefits.

8 D. All contributions to the fund shall be pooled
9 and available to pay benefits to any individual entitled
10 thereto, irrespective of the source of such contributions. The
11 standard rate of contributions payable by each employer shall
12 be five and four-tenths percent.

13 E. An employer's rate shall not be varied from the
14 standard rate for any calendar year unless, as of the
15 computation date for that year, the employer's account has been
16 chargeable with benefits throughout the preceding thirty-six
17 months, except that:

18 (1) the provisions of this subsection shall
19 not apply to governmental entities;

20 (2) subsequent to December 31, 1984, any
21 employing unit that becomes an employer subject to the payment
22 of contributions under the Unemployment Compensation Law or has
23 been an employer subject to the payment of contributions at a
24 standard rate of two and seven-tenths percent through December
25 31, 1984 shall be subject to the payment of contributions at

. 153645. 2

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1 the reduced rate of two and seven-tenths percent until, as of
2 the computation date of a particular year, the employer's
3 account has been chargeable with benefits throughout the
4 preceding thirty-six months; and

5 (3) any individual, type of organization or
6 employing unit that acquires all or part of the trade or
7 business of another employing unit, pursuant to Paragraphs (2)
8 and (3) of Subsection E of Section 51-1-42 NMSA 1978, that has
9 a reduced rate of contribution shall be entitled to the
10 transfer of the reduced rate to the extent permitted under
11 Subsection G of this section.

12 F. The secretary shall, for the year 1942 and for
13 each calendar year thereafter, classify employers in accordance
14 with their actual experience in the payment of contributions
15 and with respect to benefits charged against their accounts,
16 with a view of fixing such contribution rates as will reflect
17 such benefit experience. An employer's rate for any calendar
18 year shall be determined on the basis of the employer's record
19 and the condition of the fund as of the computation date for
20 such calendar year.

21 An employer may make voluntary payments in addition to the
22 contributions required under the Unemployment Compensation Law,
23 which shall be credited to the employer's account in accordance
24 with department rule. The voluntary payments shall be included
25 in the employer's account as of the employer's most recent

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1 computation date if they are made on or before the following
2 March 1. Voluntary payments when accepted from an employer
3 shall not be refunded in whole or in part.

4 G. In the case of a transfer of an employing
5 enterprise, notwithstanding any other provision of law, the
6 experience history of the transferred enterprise as provided in
7 Subsection F of this section shall be transferred from the
8 predecessor employer to the successor under the following
9 conditions and in accordance with the applicable rules of the
10 secretary:

11 (1) ~~[Definitions]~~ As used in this subsection:

12 (a) "employing enterprise" ~~[is]~~ means a
13 business activity engaged in by a contributing employing unit
14 in which one or more persons have been employed within the
15 current or the three preceding calendar quarters. An
16 "employing enterprise" includes the employer's workforce;

17 (b) "predecessor" means the owner and
18 operator of an employing enterprise immediately prior to the
19 transfer of such enterprise;

20 (c) "successor" means any ~~[individual or~~
21 ~~any type of organization]~~ person that acquires an employing
22 enterprise and continues to operate such business entity; ~~[and]~~

23 (d) "experience history" means the
24 experience rating record and reserve account, including the
25 actual contributions, benefit charges and payroll experience of

. 153645. 2

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1 the employing enterprise;

2 (e) "common ownership" means that two or
3 more businesses are substantially owned, managed or controlled
4 by the same person or persons;

5 (f) "knowingly" means having actual
6 knowledge of or acting with deliberate ignorance of or reckless
7 disregard for the prohibition involved; and

8 (g) "violates or attempts to violate"
9 includes an intent to evade, a misrepresentation or a willful
10 nondisclosure.

11 (2) Except as otherwise provided in this
12 subsection, for the purpose of this [section] subsection, two
13 or more employers who are parties to or the subject of any
14 transaction involving the transfer of an employing enterprise
15 shall be deemed to be a single employer and the experience
16 history of the employing enterprise shall be transferred to the
17 successor employer if the successor employer has acquired by
18 the transaction all of the business enterprises of the
19 predecessor; provided that:

20 (a) all contributions, interest and
21 penalties due from the predecessor employer have been paid;

22 (b) notice of the transfer has been
23 given in accordance with the rules of the secretary [~~within~~
24 ~~four years~~] during the calendar year of the transaction
25 transferring the employing enterprise or the date of the actual

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1 transfer of control and operation of the employing enterprise;

2 (c) ~~[in the case of the transfer of an~~
3 ~~employing enterprise]~~ the successor ~~[employer must]~~ shall
4 notify the division of the acquisition on or before the due
5 date of the ~~[successor employer's]~~ successor's first wage and
6 contribution report. If the successor ~~[employer]~~ fails to
7 notify the division of the acquisition within this time limit,
8 the division, when it receives actual notice, shall effect the
9 transfer of the experience history and applicable rate of
10 contribution retroactively to the date of the acquisition, and
11 the successor shall pay a penalty of fifty dollars (\$50.00);
12 and

13 (d) where the transaction involves only
14 a merger, consolidation or other form of reorganization without
15 a substantial change in the ownership and controlling interest
16 of the business entity, as determined by the secretary, the
17 limitations on transfers stated in Subparagraphs (a), (b) and
18 (c) of this paragraph shall not apply. A party to a merger,
19 consolidation or other form of reorganization described in this
20 ~~[paragraph]~~ subparagraph shall not be relieved of liability for
21 any contributions, interest or penalties due and owing from the
22 employing enterprise at the time of the merger, consolidation
23 or other form of reorganization.

24 (3) The applicable experience history may be
25 transferred to the successor in the case of a partial transfer

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1 of an employing enterprise if the successor has acquired one or
2 more of the several employing enterprises of a predecessor but
3 not all of the employing enterprises of the predecessor and
4 each employing enterprise so acquired was operated by the
5 predecessor as a separate store, factory, shop or other
6 separate employing enterprise and the predecessor, throughout
7 the entire period of the contribution with liability applicable
8 to each enterprise transferred, has maintained and preserved
9 payroll records that, together with records of contribution
10 liability and benefit chargeability, can be separated by the
11 parties from the enterprises retained by the predecessor to the
12 satisfaction of the secretary or the secretary's delegate. A
13 partial experience history transfer will be made only if the
14 successor:

15 (a) [~~the successor~~] notifies the
16 division of the acquisition, in writing, not later than the due
17 date of the successor's first quarterly wage and contribution
18 report after the effective date of the acquisition;

19 (b) [~~the successor~~] files an application
20 provided by the division that contains the endorsement of the
21 predecessor within thirty days from the delivery or mailing of
22 such application by the division to the successor's last known
23 address; and

24 (c) [~~the successor~~] files with the
25 application a Form ES-903A or its equivalent with a schedule of

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1 the name and social security number of and the wages paid to
2 and the contributions paid for each employee for the three and
3 one-half year period preceding the computation date as defined
4 in Subparagraph (d) of Paragraph (3) of Subsection H of this
5 section through the date of transfer or such lesser period as
6 the enterprises transferred may have been in operation. The
7 application and Form ES-903A shall be supported by the
8 predecessor's permanent employment records, which shall be
9 available for audit by the division. The application and Form
10 ES-903A shall be reviewed by the division and, upon approval,
11 the percentage of the predecessor's experience history
12 attributable to the enterprises transferred shall be
13 transferred to the successor. The percentage shall be obtained
14 by dividing the taxable payrolls of the transferred enterprises
15 for such three and one-half year period preceding the date of
16 computation or such lesser period as the enterprises
17 transferred may have been in operation by the predecessor's
18 entire payroll.

19 (4) If, at the time of a transfer of an
20 employing enterprise in whole or in part, both the predecessor
21 and the successor are under common ownership, then the
22 experience history attributable to the transferred business
23 shall also be transferred to and combined with the experience
24 history attributable to the successor employer. The rates of
25 both employers shall be recalculated and made effective

. 153645. 2

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1 immediately upon the date of the transfer.

2 (5) Whenever a person, who is not currently an
3 employer, acquires the trade or business of an employing
4 enterprise, the experience history of the acquired business
5 shall not be transferred to the successor if the secretary or
6 the secretary's designee finds that the successor acquired the
7 business solely or primarily for the purpose of obtaining a
8 lower rate of contributions. Instead, the successor shall be
9 assigned the applicable new employer rate pursuant to this
10 section. In determining whether the business was acquired
11 solely or primarily for the purpose of obtaining a lower rate
12 of contribution, the secretary or the secretary's designee
13 shall consider:

14 (a) the cost of acquiring the business;

15 (b) whether the person continued the
16 business enterprise of the acquired business;

17 (c) how long such business enterprise
18 was continued; and

19 (d) whether a substantial number of new
20 employees were hired for performance of duties unrelated to
21 those that the business activity conducted prior to
22 acquisition.

23 (6) If, following a transfer of experience
24 history pursuant to this subsection, the department determines
25 that a substantial purpose of the transfer of the employing

. 153645. 2

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1 enterprise was to obtain a reduced liability for contributions,
2 then the experience rating accounts of the employers involved
3 shall be combined into a single account and a single rate
4 assigned to the combined account.

5 (7) The secretary shall adopt such rules as
6 are necessary to interpret and carry out the provisions of this
7 subsection, including rules that:

8 (a) describe how experience history is
9 to be transferred; and

10 (b) establish procedures to identify the
11 type of transfer or acquisition of an employing enterprise.

12 (8) A person who knowingly violates or
13 attempts to violate a rule adopted pursuant to Paragraph (7) of
14 this subsection, who transfers or acquires, or attempts to
15 transfer or acquire, an employing enterprise for the sole or
16 primary purpose of obtaining a reduced liability for
17 contributions or who knowingly advises another person to
18 violate a rule adopted pursuant to Paragraph (7) of this
19 subsection or to transfer or acquire an employing enterprise
20 for the sole or primary purpose of obtaining a reduced
21 liability for contributions is guilty of a misdemeanor and
22 shall be punished by a fine of not less than one thousand five
23 hundred dollars (\$1,500) or more than three thousand dollars
24 (\$3,000) or, if an individual, by imprisonment for a definite
25 term not to exceed ninety days or both. In addition, such a

. 153645. 2

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1 person shall be subject to the following civil penalty imposed
2 by the secretary:

3 (a) if the person is an employer, the
4 person shall be assigned the highest contribution rate
5 established by the provisions of this section for the calendar
6 year in which the violation occurs and the three subsequent
7 calendar years; provided that, if the difference between the
8 increased penalty rate and the rate otherwise applicable would
9 be less than two percent of the employer's payroll, the
10 contribution rate shall be increased by two percent of the
11 employer's payroll for the calendar year in which the violation
12 occurs and the three subsequent calendar years; or

13 (b) if the person is not an employer,
14 the secretary may impose a civil penalty not to exceed three
15 thousand dollars (\$3,000).

16 H. For each calendar year, adjustments of
17 contribution rates below the standard or reduced rate and
18 measures designed to protect the fund are provided in
19 Paragraphs (1) through (4) of this subsection.

20 (1) The total assets in the fund and the total
21 of the last annual payrolls of all employers subject to
22 contributions as of the computation date for each year shall be
23 determined. These annual totals are here called "the fund" and
24 "total payrolls". For each year, the "reserve" of each
25 employer qualified under Subsection E of this section shall be

. 153645. 2

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1 fixed by the excess of the employer's total contributions over
2 total benefit charges computed as a percentage of the
3 employer's average payroll reported for contributions. The
4 determination of each employer's annual rate, computed as of
5 the computation date for each calendar year, shall be made by
6 matching the employer's reserve as shown in the reserve column
7 with the corresponding rate in the rate column of the
8 applicable rate schedule of the table provided in Paragraph (4)
9 of this subsection.

10 (2) Each employer's rate for each calendar
11 year commencing January 1, 1979 or thereafter shall be the
12 corresponding rate in:

13 (a) [~~the corresponding rate in~~] schedule
14 1 of the table provided in Paragraph (4) of this subsection if
15 the fund equals at least three and four-tenths percent of the
16 total payrolls;

17 (b) [~~the corresponding rate in~~] schedule
18 2 of the table provided in Paragraph (4) of this subsection if
19 the fund has dropped to less than three and four-tenths percent
20 and not less than two and seven-tenths percent of the total
21 payrolls;

22 (c) [~~the corresponding rate in~~] schedule
23 3 of the table provided in Paragraph (4) of this subsection if
24 the fund has dropped to less than two and seven-tenths percent
25 and not less than two percent of the total payrolls;

. 153645. 2

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1 (d) [~~the corresponding rate in~~] schedule
2 4 of the table provided in Paragraph (4) of this subsection if
3 the fund has dropped to less than two percent and not less than
4 one and one-half percent of the total payrolls;

5 (e) [~~the corresponding rate in~~] schedule
6 5 of the table provided in Paragraph (4) of this subsection if
7 the fund has dropped to less than one and one-half percent and
8 not less than one percent of the total payrolls; or

9 (f) [~~the corresponding rate in~~] schedule
10 6 of the table provided in Paragraph (4) of this subsection if
11 the fund has dropped less than one percent of the total
12 payrolls.

13 (3) As used in this section:

14 (a) "annual payroll" means the total
15 amount of remuneration from an employer for employment during a
16 twelve-month period ending on a computation date, and "average
17 payroll" means the average of the last three annual payrolls;

18 (b) "base-period wages" means the wages
19 of an individual for insured work during the individual's base
20 period on the basis of which the individual's benefit rights
21 were determined;

22 (c) "base-period employers" means the
23 employers of an individual during the individual's base period;
24 and

25 (d) "computation date" for each calendar

1 year means the close of business on June 30 of the preceding
 2 calendar year.

3 (4) Table of employer reserves and
 4 contribution rate schedules:

5 Employer	Contribution	Contribution	Contribution
6 Reserve	Schedule 1	Schedule 2	Schedule 3
7 10.0% and over	0.05%	0.1%	0.6%
8 9.0%- 9.9%	0.1%	0.2%	0.9%
9 8.0%- 8.9%	0.2%	0.4%	1.2%
10 7.0%- 7.9%	0.4%	0.6%	1.5%
11 6.0%- 6.9%	0.6%	0.8%	1.8%
12 5.0%- 5.9%	0.8%	1.1%	2.1%
13 4.0%- 4.9%	1.1%	1.4%	2.4%
14 3.0%- 3.9%	1.4%	1.7%	2.7%
15 2.0%- 2.9%	1.7%	2.0%	3.0%
16 1.0%- 1.9%	2.0%	2.4%	3.3%
17 0.9%- 0.0%	2.4%	3.3%	3.6%
18 (- 0.1%) - (- 0.5%)	3.3%	3.6%	3.9%
19 (- 0.5%) - (- 1.0%)	4.2%	4.2%	4.2%
20 (- 1.0%) - (- 2.0%)	5.0%	5.0%	5.0%
21 Under (- 2.0%)	5.4%	5.4%	5.4%

22 Employer	Contribution	Contribution	Contribution
23 Reserve	Schedule 4	Schedule 5	Schedule 6
24 10.0% and over	0.9%	1.2%	2.7%
25 9.0%- 9.9%	1.2%	1.5%	2.7%

. 153645. 2

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1	8.0%- 8.9%	1.5%	1.8%	2.7%
2	7.0%- 7.9%	1.8%	2.1%	2.7%
3	6.0%- 6.9%	2.1%	2.4%	2.7%
4	5.0%- 5.9%	2.4%	2.7%	3.0%
5	4.0%- 4.9%	2.7%	3.0%	3.3%
6	3.0%- 3.9%	3.0%	3.3%	3.6%
7	2.0%- 2.9%	3.3%	3.6%	3.9%
8	1.0%- 1.9%	3.6%	3.9%	4.2%
9	0.9%- 0.0%	3.9%	4.2%	4.5%
10	(- 0.1%) - (- 0.5%)	4.2%	4.5%	4.8%
11	(- 0.5%) - (- 1.0%)	4.5%	4.8%	5.1%
12	(- 1.0%) - (- 2.0%)	5.0%	5.1%	5.3%
13	Under (- 2.0%)	5.4%	5.4%	5.4%.

14 I. The division shall promptly notify each
15 employer of the employer's rate of contributions as determined
16 for any calendar year pursuant to this section. Such
17 notification shall include the amount determined as the
18 employer's average payroll, the total of all of the employer's
19 contributions paid on the employer's behalf and credited to
20 the employer's account for all past years and total benefits
21 charged to the employer's account for all such years. Such
22 determination shall become conclusive and binding upon the
23 employer unless, within thirty days after the mailing of
24 notice thereof to the employer's last known address or in the
25 absence of mailing, within thirty days after the delivery of

. 153645. 2

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1 such notice, the employer files an application for review and
2 redetermination, setting forth the employer's reason therefor.
3 The employer shall be granted an opportunity for a fair
4 hearing in accordance with rules prescribed by the secretary,
5 but an employer shall not have standing, in any proceeding
6 involving the employer's rate of contributions or contribution
7 liability, to contest the chargeability to the employer's
8 account of any benefits paid in accordance with a
9 determination, redetermination or decision pursuant to Section
10 51-1-8 NMSA 1978, except upon the ground that the services on
11 the basis of which such benefits were found to be chargeable
12 did not constitute services performed in employment for the
13 employer and only in the event that the employer was not a
14 party to such determination, redetermination or decision, or
15 to any other proceedings under the Unemployment Compensation
16 Law in which the character of such services was determined.
17 The employer shall be promptly notified of the decision on the
18 employer's application for redetermination, which shall become
19 final unless, within fifteen days after the mailing of notice
20 thereof to the employer's last known address or in the absence
21 of mailing, within fifteen days after the delivery of such
22 notice, further appeal is initiated pursuant to Subsection D
23 of Section 51-1-8 NMSA 1978.

24 J. The division shall provide each contributing
25 employer, within ninety days of the end of each calendar

. 153645. 2

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1 quarter, a written determination of benefits chargeable to the
2 employer's account. Such determination shall become
3 conclusive and binding upon the employer for all purposes
4 unless, within thirty days after the mailing of the
5 determination to the employer's last known address or in the
6 absence of mailing, within thirty days after the delivery of
7 such determination, the employer files an application for
8 review and redetermination, setting forth the employer's
9 reason therefor. The employer shall be granted an opportunity
10 for a fair hearing in accordance with rules prescribed by the
11 secretary, but an employer shall not have standing in any
12 proceeding involving the employer's contribution liability to
13 contest the chargeability to the employer's account of any
14 benefits paid in accordance with a determination,
15 redetermination or decision pursuant to Section 51-1-8 NMSA
16 1978, except upon the ground that the services on the basis of
17 which such benefits were found to be chargeable did not
18 constitute services performed in employment for the employer
19 and only in the event that the employer was not a party to
20 such determination, redetermination or decision, or to any
21 other proceedings under the Unemployment Compensation Law in
22 which the character of such services was determined. The
23 employer shall be promptly notified of the decision on the
24 employer's application for redetermination, which shall become
25 final unless, within fifteen days after the mailing of notice

. 153645. 2

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1 thereof to the employer's last known address or in the absence
2 of mailing, within fifteen days after the delivery of such
3 notice, further appeal is initiated pursuant to Subsection D
4 of Section 51-1-8 NMSA 1978.

5 K. The contributions, together with interest and
6 penalties thereon imposed by the Unemployment Compensation
7 Law, shall not be assessed nor shall action to collect the
8 same be commenced more than four years after a report showing
9 the amount of the contributions was due. In the case of a
10 false or fraudulent contribution report with intent to evade
11 contributions or a willful failure to file a report of all
12 contributions due, the contributions, together with interest
13 and penalties thereon, may be assessed or an action to collect
14 such contributions may be begun at any time. Before the
15 expiration of such period of limitation, the employer and the
16 secretary may agree in writing to an extension thereof and the
17 period so agreed on may be extended by subsequent agreements
18 in writing. In any case where the assessment has been made
19 and action to collect has been commenced within four years of
20 the due date of any contribution, interest or penalty,
21 including the filing of a warrant of lien by the secretary
22 pursuant to Section 51-1-36 NMSA 1978, such action shall not
23 be subject to any period of limitation.

24 L. The secretary shall correct any error in the
25 determination of an employer's rate of contribution during the

1 calendar year to which the erroneous rate applies,
2 notwithstanding that notification of the employer's rate of
3 contribution may have been issued and contributions paid
4 pursuant to the notification. Upon issuance by the division
5 of a corrected rate of contribution, the employer shall have
6 the same rights to review and redetermination as provided in
7 Subsection I of this section.

8 M Any interest required to be paid on advances to
9 this state's unemployment compensation fund under Title 12 of
10 the Social Security Act shall be paid in a timely manner as
11 required under Section 1202 of Title 12 of the Social Security
12 Act and shall not be paid, directly or indirectly, by the
13 state from amounts in the state's unemployment compensation
14 fund. "